IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36675

MARK VICKREY,	)	**2010 Unpublished Opinion No. 381**
	)	
Petitioner-Appellant,	)	**Filed: March 12, 2010**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
KIM JONES, Warden ICI-O, OLIVIA CRAVEN, Executive Director, PAROLE BOARD MEMBERS,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
	)	
Respondents.	)	
	)	

Appeal from the District Court of the Second Judicial District, State of Idaho, Clearwater County. Hon. John H. Bradbury, District Judge. Hon. Randall W. Robinson, Magistrate.

Order of the district court, on appeal from the magistrate division, affirming order dismissing petition for writ of habeas corpus, affirmed.

Mark Vickrey, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; William M. Loomis, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Mark Vickrey appeals from the district court's intermediate appellate decision, affirming the magistrate's dismissal of Vickrey's petition for writ of habeas corpus. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

Vickrey pled guilty to sexual battery of a minor and was sentenced to a unified term of fifteen years, with a minimum period of confinement of two years. The district court retained jurisdiction. After two failed riders, the district court relinquished jurisdiction and recommended that Vickrey not be paroled until he had completed all sex offender treatment within the Idaho Department of Corrections (IDOC). At his regular parole hearing, Vickrey was given a tentative

release date which was later extended by one month. An IDOC counselor told Vickrey that his amended release date had become final. However, later Vickrey was informed that his tentative release date had been withdrawn. The withdrawal of Vickrey's release date was based, in part, on new allegations of sexual abuse of other minor victims. After a hearing, the parole commission's hearing officer recommended that Vickrey serve his full term. The hearing officer reasoned that Vickrey had failed to successfully complete all sex offender treatment programs, failed to take accountability for his actions, and had impeded the investigation into a new crime.

Vickrey filed a self-initiated progress report and several complaints before the parole commission that he was not allowed sufficient participation in his parole hearings and sufficient access to confidential reports and documents. He also complained that he was not prepared to answer questions about the newly alleged sexual abuse of another minor at an earlier hearing and that her allegations were false. The parole commission denied Vickrey's request for reconsideration based on his lack of accountability for his crime, lack of successful completion of the long-term sex offender program, the district court's recommendation that Vickrey complete all sex offender treatment before release, the appearance of impeding a current investigation involving sexual abuse of another minor, and information that Vickrey had allegedly demanded that an additional minor consume methamphetamine prior to raping her as well.

Vickrey filed a petition for habeas corpus which was subsequently amended to more clearly articulate the issues presented. Vickrey's claims centered around the deprivation of his constitutional rights in the withdrawal of his tentative release date, lack of an opportunity to participate in the hearing before the parole commission, and lack of access to confidential reports. The magistrate denied Vickrey's motion for appointment of counsel. The magistrate granted the respondents' motion for summary judgment because Vickrey's tentative release date was not binding and he had no liberty interest in being placed on parole. Additionally, the magistrate held that Vickrey did not have a right to due process in the hearings before the parole commission to determine whether he should be placed on parole. The magistrate also concluded that the parole commission had a reasonable basis for denying parole. Vickrey appealed to the district court which affirmed the magistrate's decision after a hearing. Vickrey again appeals.

II.
STANDARD OF REVIEW

On review of a decision of the district court, rendered in its appellate capacity, we review the decision of the district court directly. *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Id.* If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Id.*

The decision to issue a writ of habeas corpus is a matter within the discretion of the court. *Johnson v. State*, 85 Idaho 123, 127, 376 P.2d 704, 706 (1962); *Brennan v. State*, 122 Idaho 911, 914, 841 P.2d 441, 444 (Ct. App. 1992). When we review an exercise of discretion in a habeas corpus proceeding, we conduct a three-tiered inquiry to determine whether the lower court rightly perceived the issue as one of discretion, acted within the boundaries of such discretion, and reached its decision by an exercise of reason. *Brennan*, 122 Idaho at 914, 841 P.2d at 444; *Sivak v. Ada County*, 115 Idaho 762, 763, 769 P.2d 1134, 1135 (Ct. App. 1989). If a petitioner is not entitled to relief on an application for a writ of habeas corpus, the decision by the petitioned court to dismiss the application without an evidentiary hearing will be upheld. *Brennan*, 122 Idaho at 917, 841 P.2d at 447. When a court considers matters outside the pleadings on an I.R.C.P. 12(b)(6) motion to dismiss, such motion must be treated as a motion for summary judgment. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990).

Summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders*, 125 Idaho at 874, 876 P.2d at 156.

The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citations omitted). The language and reasoning of *Celotex* has been adopted in Idaho. *Dunnick*, 126 Idaho at 312, 882 P.2d at 479

III.
ANALYSIS

Vickrey first argues that the magistrate erred by denying his motion for the appointment of counsel. However, in habeas proceedings there is no statutory right to counsel or Sixth Amendment right to counsel. *See Dopp v. Idaho Comm'n of Pardons & Parole*, 144 Idaho 402, 405, 162 P.3d 781, 784 (Ct. App. 2007). Additionally, this case, which solely concerns Vickrey's frustration at the parole commission's denial of his parole, does not present such

extraordinary circumstances that might potentially implicate due process protections. *See id.* (holding that some Idaho case law suggests that in extraordinary circumstances a petitioner might be entitled to the appointment of counsel pursuant to the Fifth Amendment). Therefore, we do not further address this issue.

Vickrey contends that the IDOC violated the Americans with Disabilities Act (ADA) by failing to provide a means for disabled inmates to have access to the courts. Vickrey did not raise this issue before the magistrate. Generally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). Therefore, we do not further address this issue.

Next, we consider Vickrey's arguments concerning the process surrounding the withdrawal of his tentative parole release date. There is no constitutionally protected right to parole. *Hays v. Craven*, 131 Idaho 761, 764, 963 P.2d 1198, 1201 (Ct. App. 1998). The United States Supreme Court has held that no constitutional right attaches to the mere possibility of conditional liberty. *See Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The Idaho Supreme Court has concluded that Idaho statutes do not provide a legitimate expectation of parole, but merely the possibility thereof. *See Izatt v. State*, 104 Idaho 597, 600, 661 P.2d 763, 766 (1983).

This Court has previously rejected the arguments presented by Vickrey. *See Brandt v. State*, 126 Idaho 101, 878 P.2d 800 (Ct. App. 1994). Idaho's parole statute does not create a constitutionally protected liberty interest in receiving parole and the only procedural safeguards afforded to inmates are those expressly provided by statute. *Id.* at 103-04, 878 P.2d at 802-03. "All parole dates granted by the [Parole] Commission are tentative." IDAHO ADMINISTRATIVE PROCEDURE ACT 50.01.350.03. Therefore, there is no entitlement to release until release actually occurs. Therefore, even if, as Vickrey contends, an IDOC employee told him his parole date had become final, he was not entitled to be released.

Vickrey argues that his due process rights were violated when he was not able to conduct discovery and participate in the proceedings and when certain confidential records were withheld from him. Inmates may have a right to due process in certain proceedings, such as sentencing, probation, and parole revocation. *See Drennon v. Craven*, 141 Idaho 34, 37, 105 P.3d 694, 697 (Ct. App. 2004). When being considered for parole release, inmates are due only the processes

set out by the parole statute and the parole commission's rules. *Id.* Vickrey has failed to show any violation of the parole statute or the rules of the parole commission. Vickrey also contends that the parole commission erred by withdrawing his tentative parole date because it considered new allegations of sexual abuse even though he "proved" they were false. Even if the new allegations were false,[1] this was only one of the factors considered by the parole commission. The additional factors considered by the parole commission also provided a reasonable basis for denying parole. Therefore, we do not further address this issue. Vickrey makes other arguments that we conclude are meritless or were not presented below. Therefore, we do not address them further.

IV.

CONCLUSION

Vickrey did not have a right to the appointment of counsel in his petition for habeas corpus. The parole commission's withdrawal of Vickrey's tentative parole release date did not violate his constitutional rights. Accordingly, the district court's intermediate appellate decision, affirming the magistrate's dismissal of Vickrey's petition for writ of habeas corpus, is affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**

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[1] No criminal charge was filed as a result of the allegations.